

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

APR 24 1997

Federal Communications Commission  
Office of Secretary

In the Matter of )  
 )  
Implementation of the Non-Accounting ) CC Docket No. 96-149  
Safeguards of Sections 271 and 272 of the )  
Communications Act of 1934, as amended )

**REPLY COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby responds to the comments submitted in response to the Federal Communications Commission's ("Commission") Public Notice requesting comments on the proper interpretation of Section 272(e)(4).

Aside from the Bell Operating Companies ("BOC"), the commenters in this proceeding generally wish to make Section 272(e)(4) go away. Because – in their view – Section 272(e)(4) conflicts with other provisions of the Communications Act, it cannot possibly mean what it says. Therefore, they would read this provision in a way that gives it no independent meaning at all.

There is, of course, no such conflict and no reason to read Section 272(e)(4) out of the Communications Act. These commenters contrive the appearance of conflict by studiously ignoring the differences between Section 271(a) and (b), Section 272(a)(2)(B), and Section 272(e)(4). Consider:

Section 272(a)(1) expressly provides that a BOC "may not provide any service described in paragraph (2)" (i.e., any interLATA services except for the three limited categories . . .) except through a separate affiliate.<sup>1</sup>

<sup>1</sup> Comments of AT&T Corp. ("AT&T"), filed herein Apr. 17, 1997 at 6, emphasis in original.

No. Section 272(a)(2)(B) expressly prohibits a BOC from originating in-region interLATA telecommunications services, a subset of interLATA services.

[I]t is clear that the prohibition in Section 272 against BOC unseparated-provision of in-region interLATA services must extend to BOC provision of the facilities used to provide such services as well.<sup>2</sup>

Wrong. Section 272 does not address the BOCs' provision of all in-region interLATA services and facilities; it speaks only to the in-region origination of interLATA telecommunications services.

Pursuant to [Section 272(a)], in-region, interLATA service can only be provided through a separate affiliate . . .<sup>3</sup>

Not exactly. Once it has Section 271 authorization, a BOC is free to provide in-region interLATA services; Section 272(a)(2)(B) requires only that the BOC then originate in-region interLATA telecommunications services from a separate affiliate. The BOC is free to provide directly any interLATA service that is not also an interLATA telecommunications service.

Section 272(a)(1) states in plain English that an RBOC, and its affiliates, "may not provide [in-region interLATA service] unless it provides that service through one or more affiliates. . . ."<sup>4</sup>

Wrong on all counts. Section 272 applies to BOCs, not to "RBOCs," a term unknown to the Communications Act. More important, the bracketed words do not

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<sup>2</sup> Comments of MCI Telecommunications Corporation ("MCI"), filed herein Apr. 17, 1997 at 16.

<sup>3</sup> Comments of Teleport Communications Group Inc. ("TCG"), filed herein Apr. 17, 1997 at 4.

<sup>4</sup> Comments of WorldCom, Inc. ("WorldCom"), filed herein Apr. 17, 1997 at 10, emphasis and brackets in original.

correctly paraphrase Section 272(a)(2)(B).

As U S WEST explained in its Comments, Section 271(b)(1) permits a BOC (once the Commission has given it authorization) to provide in-region “interLATA services;” Section 272(e)(4) states that a BOC “may” provide “interLATA services and facilities” to its separate affiliate, if it provides them to other carriers on the same terms.<sup>5</sup> Section 272(a)(2)(B) limits this authority by requiring, for a limited period, that the BOCs provide in-region “interLATA telecommunications services” only through a separate affiliate.

Plainly, a BOC (once it has Commission authorization) may directly provide any in-region interLATA service that does not also constitute an interLATA telecommunications service. That is, a BOC may provide –

telecommunications between a point located in a [LATA] and a point located outside such [LATA]<sup>6</sup>

so long as the interLATA service does not constitute –

the offering of [interLATA] telecommunications for a fee directly to the public.<sup>7</sup>

The BOCs derive this authority from Section 271(b)(1), as limited by Section 272(a)(2)(B): they have it no matter how one interprets Section 272(e)(4).

Thus, regardless whether Section 272(e)(4) constitutes an independent grant of authority to the BOCs, the BOCs are free (after Commission authorization) to provide interLATA services, so long as they do not offer them directly to the public

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<sup>5</sup> Comments of U S WEST, filed herein Apr. 17, 1997 at 3-4.

<sup>6</sup> 47 U.S.C. § 3(21).

<sup>7</sup> Id. § 3(46).

for a fee.

In this view of things, Section 272(e)(4) accomplishes three distinct purposes:

- Consistent with the other provisions of Section 272(e), it requires the BOCs to provide the permitted class of interLATA services (as well as interLATA facilities and intraLATA services and facilities) to all carriers (if it provides them to its separate affiliate) and to do so on the same terms and conditions and subject to appropriate cost allocation.
- It establishes that, notwithstanding the separation requirements of Section 272, the BOCs have the right to provide telecommunications services and facilities to their separate affiliates.
- Finally, we believe Section 272(e)(4) establishes that a BOC's provision of interLATA services and facilities (other than interLATA telecommunications services) to its separate affiliate (and to other carriers) is not the offer of telecommunications directly to the public.<sup>8</sup> This must be so because, otherwise, such provision would constitute an interLATA telecommunications service, which a BOC may not directly provide.<sup>9</sup>

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<sup>8</sup> This may or may not be the same concept as "private carriage." The Report and Order cites the legislative history of the Telecommunications Act of 1996 for the proposition that the definition of "telecommunications service" was intended to create a common carriage-private carriage distinction. In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 5 Comm. Reg. (P&F) 696, 776 ¶ 265 (1996) As Omnipoint points out, the language cited in the Report and Order comes from the House Report, rather than the Conference Report, and refers to the definition of "telecommunications service" in the House Bill, which expressly defined the term as the provision of telecommunications "on a common carrier basis." Comments of Omnipoint Communications, Inc. ("Omnipoint"), filed herein Apr. 17, 1997 at 7. The 1996 Act adopted the Senate Bill's definition of "telecommunications service" (see Conference Report on S.652 at 116) which does not have the "common-carrier" language.

<sup>9</sup> The requirement of appropriate cost allocation tends to confirm this reading. Such a requirement would be unnecessary with respect to the provision of "telecommunications services," which are – by definition – available to the public. Under-allocating costs to a telecommunications service in the hope of subsidizing an affiliate's provision of service thus becomes a strategy to subsidize its competitors as well. Note that the other provisions of Section 272(e), which deal with publicly-

No other commenter advances this view of Section 272(e)(4). But other commenters (with one exception)<sup>10</sup> either have failed to recognize, or have chosen to ignore, the differences between Sections 271(b)(1) and 272(e)(4) and Section 272(a)(2)(B). Once those differences are taken into account, however, we believe the above interpretation follows as a matter of course.

Other commenters wish to have the Commission read Section 272(e)(4) as merely prescribing “the nondiscrimination conditions under which a BOC may provide interLATA facilities and services that it otherwise is permitted to provide on an unseparated basis.”<sup>11</sup> But Section 272(c)(1) imposes a nondiscrimination obligation on the BOCs’ provision of “services [and] facilities.” Their interpretation thus renders Section 272(e)(4) superfluous, in violation of a “basic principle of statutory construction.”<sup>12</sup>

Plainly, Section 272(e)(4) must do more than impose a nondiscrimination obligation. As noted, we believe it confirms the BOCs’ right to provide telecommunications services and facilities to their separate affiliates, despite the separation requirements of Section 272, and it establishes that providing facilities and services to a carrier is not – without more – the provision of a telecommunications service.

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available telecommunications services (exchange telephone service and exchange access), have no such requirement.

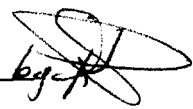
<sup>10</sup> Omnipoint at 8.

<sup>11</sup> MCI at 2; see also Comments of Sprint Corporation (“Sprint”), filed herein Apr. 17, 1997 at 2; WorldCom at 12.

For the reasons stated, the Commission should adopt U S WEST's interpretation of Section 272(e)(4).

Respectfully submitted,

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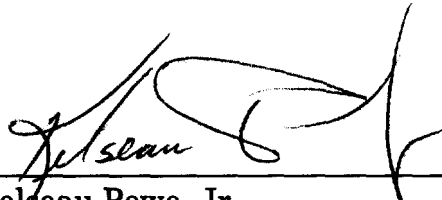
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<sup>12</sup> MCI at 6.

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 24th day of April, 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served, via first-class U.S. Mail, postage-prepaid, upon the persons listed on the attached service list.



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